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Committee

Larry E. Craig, Chairman
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No. 15

Legislative Notice

Editor, Judy Gorman Prinkey

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H.R. 1122 — Partial-Birth Abortion Ban Act of 1997

H.R. 1122 was approved by the House of Representatives on March 20, 1997, by a vote of 295 to 136, a margin sufficient to override a threatened veto from President Clinton. H. Rept. 105-24. The similar Senate bill, S. 6, is in the Committee on the Judiciary.

NOTEWORTHY

- The Senate is expected to begin consideration of H.R. 1122 during the week of May 12, 1997. Following the bill's approval in the House on March 20, by a veto-proof vote of 295 to 136, H.R. 1122 has been held at the desk in the Senate.

- H.R. 1122 prohibits "partial birth abortion" — defined in the bill as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery" — unless performance of the procedure is "necessary to save the life of the mother . . . and no other medical procedure would suffice for that purpose."

- H.R. 1122 is identical to the "Partial-Birth Abortion Ban Act of 1995" (H.R. 1833 in the 104th Congress), which President Clinton vetoed on April 10, 1996. The veto override vote succeeded in the House on September 19 (285 to 137) but failed in the Senate on September 26 (58 to 40; the measure initially had been approved by the Senate on December 7, 1995, by a vote of 54 to 44). President Clinton has threatened to veto the bill again if it comes to his desk in its current form.

- Possible amendments include (1) a Daschle substitute which would (according to his recent op-ed) "ban not only 'partial-birth' abortions but also other, equally troubling methods of late-term abortion"; and (2) a similar Feinstein/Boxer/Moseley-Braun substitute. However, RPC concludes that both measures, favored by the Clinton White House, would place the legality of a late-term abortion — defined by fetal "viability" and the health risk to the mother — at the sole judgment of the person performing the abortion. Neither would place any restrictions on second-trimester abortions, when the large majority of partial-birth procedures take place. (For further details and analysis, see "Possible Amendments," page 12.)

HIGHLIGHTS

- H.R. 1122 prohibits the performance of partial-birth abortions, which are defined in the bill as abortions "in which the person performing the abortion partially vaginally delivers the living fetus before killing the fetus and completing the delivery."

- According to this definition, the prohibition established in H.R. 1122 would *not* apply to (1) abortions performed by C-section or hysterotomy (i.e., where the fetus is not extracted vaginally), nor to (2) abortions in which the fetus is killed *prior* to being moved into the birth canal.

- The person performing such an abortion would be subject to fines or imprisonment of up to two years, or both. The mother of the aborted fetus is explicitly exempted from prosecution. In addition, the person performing the abortion is liable for civil damages to the father of the aborted child and, if the mother is under 18 years old, the maternal grandparents of the child.

- The prohibition does not apply to a partial-birth abortion that is "necessary to save the life of a mother whose life is endangered by a physical disorder, illness, or injury" if "no other medical procedure would suffice for that purpose."

- During the 104th Congress, the 12-physician Council on Legislation of the American Medical Association (AMA) voted unanimously to recommend to the AMA's Board of Trustees that they endorse the partial-birth abortion bill; the Board did not, however, take a position on the bill at that time. As the Senate prepares to begin consideration of H.R. 1122, it was unclear whether or not the AMA Board would now take a position for or against the partial-birth ban.

- H.R. 1122 is similar to S. 6, which was introduced on January 21, 1997, and referred to the Committee on the Judiciary. On March 11, 1997, the Judiciary Committee, together with the House Judiciary Subcommittee on the Constitution, conducted an unusual joint hearing on S. 6/H.R. 1122.

- Both now and in the previous Congress, a particular point of debate has been the number of partial-birth abortions that are performed and the medical or social reasons for them. Organizations opposing the bill, as well as President Clinton, have repeatedly claimed that only a few hundred partial-birth procedures take place each year, only in the third trimester of pregnancy, most if not all of which are based on extreme circumstances of fetal deformity or danger to the mother. However, these claims have been contradicted by press accounts indicating that thousands of partial-birth abortions take place yearly, the large majority occurring in the second trimester, and are performed for elective (i.e., non-medical) reasons. In addition, earlier this year a noted spokesman for an abortionists' professional organization admitted that he had knowingly misrepresented the frequency of partial-birth abortion in supporting the

"party line" against the bill. (For further details, see below, page 7, "The Ron Fitzsimmons Admission: 'I Lied.'") One of the two leading practitioners of the abortion technique prohibited by this bill claims that 80 percent of the partial-birth abortions which he performs are "purely elective."

BACKGROUND

Partial-birth abortion, the procedure prohibited under H.R. 1122, is a method that is employed from approximately the mid-point in pregnancy (i.e., after about 20 weeks' gestation) up to the time of delivery. On June 16, 1995, the *Los Angeles Times* described the procedure as follows:

> **"The procedure requires a physician to extract a fetus, feet first, from the womb and through the birth canal until all but its head is exposed. Then the tips of surgical** [i.e., blunt curved Metzenbaum] **scissors are thrust into the base of the fetus' skull, and a suction catheter is inserted through the opening and the brain is removed."**

Removal of the brain collapses the skull and completes the extraction of the fetal body. (A pointed hollow metal tube called a trochar is sometimes used instead of scissors to puncture the skull.) The main surgical advantage of the partial-birth abortion technique, as opposed to other methods that involve the intra-uterine dismemberment of the living fetus, is its relative ease for the person performing the abortion. As Dr. W. Martin Haskell, a noted proponent and practitioner of partial-birth abortions, describes his development of the procedure:

> **"D&Es** ["dilation and evacuations," i.e., live intrauterine fetal dismemberments], **the procedure typically used for later abortions, have always been somewhat problematic because of the toughness and development of the fetal tissues. . . . I kept doing D&Es because that was what I was comfortable with, up until 24 weeks. But they were very tough. Sometimes it was a 45-minute operation. I noticed that some of the later D&Es were very, very easy. So I asked myself why can't they all happen this way. You see the easy ones would have a foot length presentation, you'd reach up and grab the foot of the fetus, pull the fetus down and the head would hang up and then you would collapse the head and take it out. It was easy. At first, I would reach around trying to identify a lower extremity** [i.e., a foot] **blindly with the tip of my instrument. I'd get it right about 30-50 percent of the time. Then I said, 'Well gee, if I just put the ultrasound up there I could see it all and I wouldn't have to feel around for it.' I did that and sure enough, I found it 99 percent of the time. Kind of serendipity."**
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> ["2nd Trimester Abortion: An interview with W. Martin Haskell, MD," *Cincinnati Medicine*, Fall 1993]

The partial-birth procedure also lessens the chance that fetal tissue might be left behind in the mother's body. With respect to current law, it is essential that the procedure be completed *before* the fetus' head leaves the birth canal; once the fetus were completely clear of the mother's body, a live delivery would have occurred and the child would be protected by existing criminal statutes.

According to an interview with Dr. Haskell in the American Medical Association's *American Medical News* of July 5, 1993, approximately one-third of fetuses involved in this procedure "are definitely dead" before removal of the fetus, and "probably the other two-thirds are not." In testimony before the House Judiciary Subcommittee on the Constitution on June 15, 1995 (and cited in the 1997 House Committee Report), Professor Robert White, Director of the Division of Neurosurgery and Brain Research Laboratory at Case Western Reserve University stated that fetuses within the gestational period when this procedure is performed are "fully capable of experiencing pain."

President Clinton justified his veto of the bill passed by the 104th Congress by claiming that the partial-birth procedure is medically necessary:

- In **"a small number of compelling cases"** (April 10, 1996, veto message, *Congressional Record*, April 15, H 3338);
- To protect the mother from **"serious injury to her health"** (April 10 veto message); and
- To avoid the mother's **"losing the ability to ever bear further children"** (May 23, 1996, press conference).

As detailed below, each of the President's assertions is demonstrably false. According to reputable medical testimony — plus evidence given by prominent *practitioners* of partial-birth abortion:

- The procedure is more widespread than its defenders admitted;
- In the vast majority of cases when the partial-birth technique is used, it is for elective (i.e., entirely non-medical) purposes; and
- It is *never* necessary to safeguard the mother's health or fertility.

Numbers of Partial-Birth Abortions

A major point of contention between proponents and opponents of H.R. 1122 has been establishing exactly how many partial-birth abortions are performed each year. Dr. Haskell, together with another noted practitioner of the technique, Dr. James McMahon (who died in late 1995), were credited by the National Abortion Federation (a professional association of abortion providers) with the performance of 450 partial-birth abortions per

year between them. In a 1992 article, Dr. Haskell referred to having performed "over 700" such abortions. Both physicians have actively promoted the partial-birth technique within the abortion industry. In general, prior to consideration of the partial-birth bill in the 104th Congress, many estimates reported in the press were based on the public claims of just these *two* prominent practitioners of the technique and the numbers they *personally* performed *per year*, without taking into account those performed by other abortionists — while supporters of the bill insisted the total number, though not known exactly, must surely be *much larger*. According to the *New York Times* of November 6, 1995, prior to the Senate's initial consideration of the bill:

> "About 13,000 of the nation's 1.5 million abortions a year are performed after 20 weeks' gestation. And only two doctors [i.e., Haskell and McMahon], who perform a total of about 450 of these abortions a year, have said publicly that this method is the safest and best. So most discussion of the proposed ban has been based on the assumption that the method is rarely used, and only by a small number of doctors. But the National Abortion Federation, which represents several hundred abortion providers, says that more doctors have recently reported that they sometimes use the method, which they call 'intact D&E [i.e., dilation and evacuation].' And since the House vote, some gynecologists at prominent hospitals have acknowledged that they often use the method in late-term abortions. 'Of course I use it, and I've taught it for the past 10 years,' said a gynecologist at a New York teaching hospital, who spoke on condition of anonymity."

Despite such indications, groups opposed to prohibiting partial-birth abortions, along with sympathetic press reports, persisted in claiming that partial-birth abortion is rare. For example, the *New York Times* (3/28/96) reported: **"The number of procedures that meet the definition of partial birth abortion is very small, probably only 500 or 1,000 a year."**

However, during the interim between the Clinton veto and the override votes in September 1996, investigative press accounts appeared indicating that the actual number of partial-birth procedures performed in the United States was far larger than originally admitted. For example:

- As stated in the Bergen County, NJ, *The Sunday Record* (9/15/96): **"Interviews with physicians who use the method reveal that *in New Jersey alone*, at least 1,500 partial-birth abortions are performed each year."** [emphasis added]

- **"Another** [New York] **metropolitan area doctor who works outside New Jersey said he does about 260 post-20-week abortions a year, of which half are by intact D&E. The doctor, who is also a professor at two prestigious teaching hospitals, said he had been teaching intact D&E since 1981, and he said he knows of two former students on Long Island and two in New York City who use the procedure."** [*The Sunday Record*, 9/15/96]

- Based on these revelations, as well as the admission of abortion lobbyist Ron Fitzsimmons (for further details, see below, page 7, "The Ron Fitzsimmons

Admission: 'I Lied'"), it is now believed that the actual number of partial-birth abortions performed nationwide per year is at least **in the range of 3,000 to 5,000**, with only some 500 to 750 (approximately 15 percent) occurring in the third trimester. [Ron Fitzsimmons, *ABC* "Nightline," February 26, 1997]

Reasons for Partial-Birth Abortion

Likewise, the President's claim that partial-birth abortion is performed only in "compelling cases" to protect the mother from "serious injury to her health" is unsupportable. On the contrary, as abortion lobbyist Fitzsimmons admitted to the *New York Times* (2/26/97), in **"the vast majority of cases, the procedure is performed on a healthy mother with a healthy fetus."** Likewise, in his 1993 interview with *American Medical News,* noted previously, Dr. Haskell had stated that with respect to his practice:

> **"I'll be quite frank: most of my abortions are elective in that 20-24 week range. . . . In my particular case, probably 20 percent are for genetic reasons. And the other 80 percent are purely elective. . . ."**

Even the category of "non-elective abortions" is subject to qualification. In materials submitted to the House subcommittee, Dr. McMahon used a highly expansive definition for "non-elective" abortions performed up to 40 weeks' gestation (i.e., full term), including "maternal depression" and maternal youth ("pediatric indications"). The same materials indicated that half of the fetuses aborted at 26 weeks by Dr. McMahon were perfectly healthy; those which he classified as "flawed fetuses" included some with conditions compatible with long life, with or without disability, such as nine fetuses aborted using the partial-birth procedure because of a cleft lip.

There is abundant evidence that, contrary to the claims of H.R. 1122 opponents, partial-birth abortions are performed overwhelmingly on normal fetuses for elective (i.e., birth control) purposes.

- **"'We have an occasional amnio abnormality, but it's a minuscule amount,' said one of the doctors . . . 'Most** [of the mothers] **are Medicaid patients, black and white, and most are for elective, not medical, reasons: people who didn't realize, or didn't care, how far along they were.'"** [Bergen County, NJ, *The Sunday Record*, 9/15/96]

- **"It is possible — and maybe likely — that the majority of these abortions are performed on normal fetuses, not on fetuses suffering genetic or other developmental abnormalities. Furthermore, in most cases where the procedure is used, the physical health of the woman whose pregnancy is being terminated is not in jeopardy. . . . Instead, the 'typical' patients tend to be young, low-income women, often poorly educated or naive, whose reasons for waiting so long to end their pregnancy are rarely medical."** [*The Washington Post*, 9/17/96]

Maternal Health and Fertility

Perhaps the most emotionally charged argument used by President Clinton to justify his veto of the partial-birth abortion ban last year is the claim that a health exception is necessary to protect women from (in the President's words of May 23, 1996) being "eviscerated" or "ripped to shreds" — and "losing the ability to ever bear further children."

- This claim is roundly refuted by four specialists in OB/GYN and fetal medicine representing PHACT (Physicians' Ad Hoc Coalition for Truth), a group of over 500 doctors, mostly specialists in OB/GYN, maternal and fetal medicine, and pediatrics, including former Surgeon General C. Everett Koop: **"Contrary to what abortion activists would have us believe, partial-birth abortion is *never* medically indicated to protect a woman's health or her fertility. In fact, the opposite is true: The procedure can pose a significant and immediate threat to both the pregnant woman's health and fertility."** ["Partial-Birth Abortion Is Bad Medicine," *The Wall Street Journal,* 9/19/96; original emphasis]

- The four PHACT physicians detail the nature of that threat, including forcible dilation of the cervix ***over several days*** — which illustrates that this is ***not*** a procedure used in emergency circumstances relating to the mother's life or health. The result is "incompetent cervix," the leading cause of premature deliveries; intentionally and dangerously causing a breech delivery during the procedure; and risking injury to the mother by forcing the scissors into the child's head while it is still in her body.

- They also deny that fetal abnormality would ever indicate partial-birth abortion to safeguard maternal health or fertility: **"In some cases, when vaginal delivery is not possible, a doctor performs a Caesarian section. But in no case is it necessary to partially deliver an infant through the vagina and then kill the infant."** That is, despite the claims of H.R. 1122 opponents, ending a pregnancy does not translate into the need to kill a partially delivered fetus — as opposed to completing the delivery of a live, and possibly viable, infant.

The Ron Fitzsimmons Admission: "I Lied"

The controversy over the number of partial-birth abortions and the reasons for them sharpened with the February 1997 admission by Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers (which represents about 200 independently owned abortion clinics) that he had lied in previous claims of the rarity of the procedure and the compelling reasons for it.

> **"In an article in the American Medical News, to be published March 3, and an interview today, Mr. Fitzsimmons recalled the night in November 1995, when he appeared on 'Nightline' on ABC and 'lied through my teeth' when he said the procedure was used rarely and only on women whose lives were in danger or whose fetuses were damaged. * * *"**

> **"In the vast majority of cases, the procedure is performed on a healthy mother with a healthy fetus that is 20 weeks or more along, Mr. Fitzsimmons said. 'The abortion-rights folks know it, the anti-abortion folks know it, and so, probably, does everyone else," he said. . . . One of the facts of abortion, he said, is that women enter abortion clinics to kill their fetuses. 'It is a form of killing,' he said. 'You're ending a life.'"**
> ["An Abortion Rights Advocate Says He Lied About Procedure," *The New York Times*, 2/26/97]

The earlier misrepresentations made by Mr. Fitzsimmons were not unique. Rather, there are other opponents of the partial-birth ban who have tried to obscure the facts surrounding the procedure. Mr. Fitzsimmons himself characterized his lying as having **"spouted the party line"** ["Head of Abortion Group Admits Lying in Interview; 'Partial-Birth' Statements Were 'the Party Line," *The Washington Post*, 2/27/97] and he has called on the abortion movement to back away from **"spins"** and **"half-truths"** ["Medicine adds to debate on late-term abortion; Abortion rights leader urges end to 'half truths,'" *American Medical News*, 3/3/97]. A number of other organizations have made (but not retracted) claims similar to those previously made by Mr. Fitzsimmons, which he later admitted were conscious falsehoods, in defense of the procedure often referred to by its defenders as "intact dilation and evacuation" ("IDE" or "intact D&E"), "dilation and extraction" ("D&X"), or even the Orwellian "intrauterine cranial decompression" [*Los Angeles Times*, 4/2/97]. The following are examples:

- "The truth is that the D&X procedure is only used when the woman's life or health is in danger or in cases of extreme fetal anomaly." [Planned Parenthood Federation of America, news release, 3/21/96] "The procedure, dilation and extraction (D&X), is extremely rare and done only in cases when the woman's life is in danger or in cases of extreme fetal abnormality." [Planned Parenthood Federation of America, news release, 11/1/95]

- "But late-term abortions are used under the most compelling of circumstances — to protect a woman's health or life or because of grave fetal abnormality." [National Abortion and Reproductive Rights Action League (NARAL) President Kate Michaelman, op-ed, *The Washington Times*, 6/16/97] Referring to the 9/15/96 article in the Bergen County, NJ, *The Sunday Record*, claiming 1,500 partial-birth abortions in New Jersey alone: "The 1,500 is a lie. There is a lie out there." [Michaelman, *CNN* "Crossfire," 9/26/96]

- "The particular procedure [i.e., "intact dilation and evacuation"] is used only in about 500 cases per year, generally after 20 weeks in pregnancy, and most often when there is a severe fetal anomaly or maternal health problem detected late in pregnancy." [National Abortion Federation (NAF), web page, 2/25/97] "The [partial-birth] bill is an attack on a particular type of abortion procedure, used generally at or after 20 weeks' gestation. . . . [F]ewer than 500 such procedures take place each year. . . . The majority of these procedures take place when wanted pregnancies go horribly wrong, and severe fetal anomalies or grave maternal health problems are detected later in pregnancy." [NAF, news release, 7/18/95]

- "This surgical procedure [i.e., "known to abortion providers as intact D&E or D&X"] is used only in rare cases, fewer than 500 per year. It is most often performed in the case of wanted pregnancies gone tragically wrong, when a family learns late in pregnancy of severe fetal anomalies or a medical condition that threatens the pregnant woman's life or health." [Letter to Representative Tom Coburn (OK, 2d), 10/2/95, signed by 53 organizations including the Alan Guttmacher Institute, the American Civil Liberties Union, the National Abortion Federation, NARAL, the National Organization for Women, People For the American Way Action Fund, Planned Parenthood Federation of America, and Zero Population Growth]

Partial-Birth Fetuses: Alive or Dead?

Another of the outstanding controversies surrounding the partial-birth debate is the question of whether or not the partially delivered fetus is still alive at the time the skull is crushed and the extraction is completed. During the deliberations of the 104th Congress, bill opponents repeatedly claimed that anesthesia administered to the mother undergoing partial-birth abortion was sufficient to cause fetal death. (For example: "The fetus dies of an overdose of anesthesia given to the mother intravenously. . . . This induces brain death in the fetus in a matter of minutes. Fetal demise therefore occurs at the beginning of the procedure while the fetus is still in the womb." ["H.R. 1833: Medical Questions and Answers," Mary Campbell, M.D., Planned Parenthood, quoted in H. Rept. 105-24, pages 8-9.] As with claims that the partial-birth procedure was "rare" or numbered in the hundreds, not thousands, assertions of anesthesia-induced fetal death were given wide publicity by opponents of the partial-birth ban and were repeated by the media.

The anesthesia/fetal death assertion provoked a sharp response in the medical community, particularly from anesthesiologists:

> **"Dr. Norig Ellison, the president of the American Society of Anesthesiologists, says that this claim has 'absolutely no basis in scientific fact.' Dr. David Birnbach, the president-elect of the Society for Obstetric Anesthesia and Perinatology, says it is 'crazy' because 'anesthesia does not kill an infant if you don't kill the mother.' * * ***
>
> **"The creation of this anesthesia myth is particularly unconscionable and could pose a threat to the health of mothers. Dr. Ellison expressed this concern, 'I am deeply concerned * * * that widespread publicity * * * may cause pregnant women to delay necessary and perhaps life-saving medical procedures, totally unrelated to the birthing process, due to misinformation regarding the effects of anesthetics on the fetus.' He also pointed out that, 'Annually more than 50,000 pregnant women receive anesthesia while undergoing necessary, even lifesaving, surgical procedures. If the concept that anesthesia could produce neurologic demise of the fetus were not refuted, pregnant women might refuse to undergo necessary procedures.' * * ***
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> **"[According to Dr. Birnbach]: 'Having administered anesthesia for fetal surgery, I know that on occasion we need to administer anesthesia directly to the**

fetus because even at these early ages the fetus moves away from the pain of the stimulation.'" [H. Rept. 105-24, pages 9-10]

Since the anesthesia/fetal death claim was thoroughly debunked last year, it has not been raised in the context of this year's debate — though none of its past proponents has publicly disavowed it. However, this year, opponents of the partial-birth ban are advancing a new claim — not raised last year — to the effect that in most cases of "intact D&E" the fetus is already killed *in utero* prior to entering the birth canal. For example: "I mean there are variations on the theme, if you will, but we're not talking about a living fetus. The fetus is dead in utero" [Fitzsimmons, *ABC* "Nightline," 2/26/97]. (When contacted by RPC, Mr. Fitzsimmons stated that "many methods" are used to effect intrauterine fetal death, but the only one he could cite was lethal injection. He insisted that the "large majority" are killed *in utero* but could not cite either specific numbers or sources for that assertion.) "Lee Carhart, MD, a Bellvue, Neb., physician, said last year that he had done about 5,000 intact D&Es, about 1,000 during the past two years. He induces fetal death by injecting digoxin or lidocaine into the fetal sac 72 hours before the fetus is extracted" [*American Medical News*, 3/3/97].

In light of previous misrepresentations by bill opponents, the new claims about the prevalence of intrauterine fetal death should not be taken at face value: "Most doctors who perform abortions 'do not have the skills to do fetal injections,' said Dr. Timothy Johnson, a professor at the University of Michigan. 'My feeling is that if there's no medical reason for injecting the fetus, there could be increased risk for the mother.' Johnson admitted those risks were small, but still 'medically unacceptable'" [*Associated Press*, 5/7/97]. In any case, to the extent that the claims are true, these abortions would not meet the definition of "partial-birth" as defined in H.R. 1122, which applies only to the partial delivery of a *living* fetus.

BILL PROVISIONS

H.R. 1122 amends Title 18 of the United States Code (Crimes and Criminal Procedure) to create a new provision (Chapter 74): "Partial-Birth Abortions: Section 1531. Partial-birth abortions prohibited."

Subsection (a)

This subsection provides that whoever, in or affecting interstate or foreign commerce, "knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than two years, or both. This paragraph shall not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is

endangered by a physical disorder, illness, or injury: *Provided*, That no other medical procedure would suffice for that purpose. This paragraph shall become effective one day after enactment."

Subsection (b)

"Partial-birth abortion" is defined as "an abortion in which the person performing the abortion partially vaginally delivers a living fetus before killing the fetus and completing the delivery."

> [***RPC Note***: According to this definition, the prohibition established in H.R. 1833 would *not* apply to (1) abortions performed by C-section or hysterotomy (i.e., where the fetus is not extracted vaginally), nor to (2) abortions in which the fetus is killed *prior* to being moved into the birth canal.]

Subsection (c)

This subsection establishes a civil cause of action against a person performing an abortion in violation of this section on the part of the father of the aborted fetus, and if the mother has not attained the age of 18 years, on the part of the maternal grandparents of the aborted fetus. Civil relief may include "money damages for all injuries, psychological and physical, occasioned by the violation" and "statutory damages equal to three times the cost of the partial-birth abortion." Civil relief is not available if the pregnancy is the result of the plaintiff's criminal misconduct (e.g., where the father had impregnated the mother by rape, or where the maternal grandfather had impregnated the mother by incest) or if the plaintiff had consented to the abortion.

Subsection (d)

This subsection consists of a broad grant of immunity to the mother against any action arising out of the performance of the partial-birth abortion.

COST

"CBO estimates that enacting this legislation would have no significant impact on the federal budget." [H. Rept. 105-24, page 25]

ADMINISTRATION POSITION

On March 20, 1997, during House consideration of H.R. 1122, the Office of Management and Budget issued a Statement of Administration Policy, as follows:

"H.R. 1122 contains the same serious flaws as H.R. 1833, an identical bill that passed during the 104th Congress and vetoed by the President on April 10, 1996. The President will veto H.R. 1122 for the reasons he expressed in his veto message of April 10, 1996."

Attached to the statement was the President's 1996 veto message, mostly concerned about his view for the need for a "health" exception in the bill. For an analysis of the President's objections, see pages 4 through 7 of this *Legislative Notice*.

POSSIBLE AMENDMENTS

[***RPC Note***: Because the Partial-Birth Abortion Ban Act is one of the GOP Leadership's top ten bills in the 105th Congress, the Daschle substitute — which reflects the position of the Clinton Administration — is not only detailed but analyzed by RPC staff.]

Minority Leader Daschle has indicated that he will offer an amendment in the form of the substitute language he outlined in a May 2, 1997, op-ed in *The Washington Post* ("Late-Term Abortion — In Rare Cases Only") and during a press conference on May 8. In addition, an amendment may be offered by Senators Feinstein, Boxer, and Moseley-Braun consisting of the text of their bill, S. 481. These are discussed below.

The Daschle Substitute

Senator Daschle has released only a portion of his bill, as follows:

"It shall be unlawful to abort a viable fetus unless the physician certifies that continuation of the pregnancy would threaten the mother's life or risk grievous injury to her physical health. 'Grievous injury' shall be defined as:

"(a) a severely debilitating disease or impairment specifically caused by the pregnancy; or

"(b) an inability to provide necessary treatment for a life-threatening condition.

"'Grievous injury' does not include any condition that is not medically diagnosable or any condition for which termination of pregnancy is not medically indicated."

As described by his May 2 op-ed, the purpose of his bill would be to "ban not only 'partial-birth' abortions but also other, equally troubling methods of late-term abortion."

RPC Analysis of the Daschle Substitute

RPC concludes that, despite its stated purpose, the Daschle substitute would not bar *any* abortions whatsoever:

- Even on its face, the Daschle language would not apply to the large majority (approximately 85 percent) of partial-birth abortions that occur ***during the second trimester***. Senator Daschle's references to "viable" fetuses and "late-term" abortions should be read in light of earlier statements to the effect of banning only third- (or final-) trimester abortions: **"Well but, we're talking about the final trimester here. And what we're trying to do is find a way in the final trimester to preclude convenience as a reason for having the procedure done."** [News briefing, 11/26/96] **"An aide to Daschle 'is working with a group of Democrats and Republicans to produce a bill that will ban all late-term abortions . . . . ' Added the aide: 'The Daschle alternative will actually say post-viability abortions, which is generally third trimester . . . .'"** [*White House Bulletin*, 4/30/97]

- Under the Daschle language, the only person who could judge the legality of a given abortion is the abortionist himself, who has a pecuniary interest in performing the procedure. Both the viability of the fetus and the diagnosis of the health risk are subject *solely* to the certification of the physician performing the abortion. No provision is made for any review of the physician's certification or the medical basis for it. In short, the only way a person performing any abortion could violate the Daschle amendment would be by his own affirmation that he had committed a violation.

- By definition, the Daschle language applies only to "viable" fetuses — that is, those capable of life outside the womb. This begs the questions as to why, if "continuation of the pregnancy would threaten the mother's life or risk serious injury to her physical health," it would be necessary or even allowable to kill an infant capable of sustained life rather than terminate the pregnancy through live delivery.

The Feinstein/Boxer/Moseley-Braun Amendment

S. 481, the "Post-Viability Abortion Restriction Act," was introduced on March 19, 1997, and referred to the Committee on the Judiciary. The bill would prohibit an abortion "after the fetus has become viable" except in cases where "in the medical judgment of the attending physician, the abortion is necessary to preserve the life of the woman or to avert serious adverse health consequences to the woman."

RPC Analysis of the Feinstein/Boxer/Moseley-Braun Amendment

Like the Daschle language, the Feinstein/Boxer/Moseley-Braun language would place the sole authority to determine the legality of a given abortion in the hands of the abortionist. The Feinstein/Boxer/Moseley-Braun standard of "serious adverse health consequences" is identical to that proposed in the House by Representatives Hoyer and Greenwood; during House debate, proponents admitted that standard would include "mental health" considerations.

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